Proceedings of The Second Western Regional Conference on State-Federal Judicial Relationships

Westin La Paloma
Tucson, Arizona
October 11-13, 2000

SJI

Second Western Regional Conference
on
State-Federal Judicial Relationships

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Reporter:

Professor John B. Oakley
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Davis, California

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John B. Oakley
Reporter

The conference and this report of the conference were developed under a grant from the State Justice Institute. The points of view expressed do not necessarily represent the official position of the State Justice Institute.

THE SECOND WESTERN REGIONAL CONFERENCE ON STATE-FEDERAL JUDICIAL RELATIONSHIPS

Sharing Ideas and Building Communication

October 11-13, 2000
Westin La Paloma Resort
Tucson, Arizona

The Washington Administrative Office of the Courts and the Office of the Circuit Executive for the United States Courts of the Ninth Circuit are pleased to invite members of the state and federal justice systems to examine joint issues of concern and find creative solutions that can be implemented throughout the region.

The Planning Committee, composed of state and federal court judges and administrators, has developed a dynamic program with expert speakers and demonstrations. State and federal judges will collaborate on teams to consider new initiatives or expansion of existing programs within their states.

◦ Wednesday, October 11, 2000

1:30 p.m. Facilitator Training for Discussion Leaders
5:00 p.m. Registration
6:00 p.m. Welcoming Reception

◦ Thursday, October 12, 2000

9:00 a.m. General Session
Judging Science: Judges As Gatekeepers
Genetics and The Law
Rule 35 Testing and Other Issues
12:30 p.m. Group Lunch
1:30 p.m. General Session
Point/Counterpoint: Jury Trends and Innovations
2:45 p.m. Breakout groups
4:00 p.m. Implementation Discussions
7:00 p.m. Group Dinner

- Friday, October 13, 2000

8:00 a.m.	General Session Capital Habeas: Theory and Practice Demystifying the Courts: Effective Community Outreach
12:00 p.m.	Group Lunch
1:00 p.m.	Breakout Groups
2:00 p.m.	Implementation Discussions
3:00 p.m.	Wrap-up
4:00 p.m.	Conference Concludes

A program agenda and pre-conference reference materials will be mailed several weeks before the conference. Please make your lodging reservations with La Paloma **no later than September 1, 2000** to ensure approved conference rates. Conference rates will apply should you wish to extend your stay over the weekend. (These extra costs are non-reimbursable.) Please consult the hotel, transportation and meal forms for additional information.

This Conference is made possible through a generous grant from the state Justice Institute.

PROCEEDINGS OF THE SECOND WESTERN REGIONAL CONFERENCE ON STATE-FEDERAL JUDICIAL RELATIONSHIPS

Westin La Paloma Resort
Tucson, Arizona
October 12-13, 2000

John B. Oakley
Reporter[*]

REPORTER'S PREFACE

These proceedings again place state and federal judges of our nine most western states at the forefront of efforts to build and maintain optimal working relationships between state and federal courts. The modern era of proactive state-federal judicial bridge-building began with the National Conference on State-Federal Judicial Relationships held in Orlando, Florida, on April 10-12, 1992.[1] The first regional conference to be held as a follow-up to the Orlando conference was the Western Regional Conference on State-Federal Judicial Relationships held in Stevenson, Washington, on June 4-5, 1993, under the sponsorship of the State Justice Institute and the Office of the Circuit Executive for the Ninth Circuit.[2] Other circuits later joined with the State Justice Institute to sponsor similar regional conferences in other parts of the country.[3] The Ninth Circuit and its allied state courts are the first region to team with the State Justice Institute to hold a second conference on state-federal judicial relationships.

The Planning Committee[4] for the Second Western Regional Conference was organized in the spring of 1999. The minimum time for the planning process is approximately one year;

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[*]Professor of Law, King Hall School of Law, University of California, Davis. B.A. 1969, University of California, Berkeley; J.D. 1972, Yale University.

[1]*See* NATIONAL CONFERENCE ON STATE-FEDERAL JUDICIAL RELATIONSHIPS, 78 VA. L. REV. 1655 (1992) (special issue collecting papers and commentary from the Orlando Conference).

[2]*See* John B. Oakley, *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F.R.D. 233 (1994).

[3]*See, e.g.,*William K. Slate II, *Proceedings of the Middle-Atlantic State-Federal Judicial Relationships Conference*, 162 F.R.D. 173 (1995).

[4]The Planning Committee was co-chaired by Judge Ancer L. Haggerty of the United States District Court for the District of Oregon and Judge Judith McConnell of the Superior Court of California for the County of San Diego. The other members of the Planning Committee were Associate Justice Richard M. Sims III of the California Court of Appeal for the Third District, Judge Philip M. Pro of the United States District Court for the District of Nevada, Magistrate Judge Larry M. Boyle of the United States District Court for the District of Idaho, Mary C. McQueen, Administrator for the Courts of the State of Washington, Robin Donoghue, Assistant Circuit Executive of the Ninth Circuit for Legal Affairs, Renée Lorda, Assistant Circuit Executive of the Ninth Circuit for Judicial Conference and Education, and the Reporter, Professor John B. Oakley of the School of Law of the University of California at Davis.

after considering dates in the spring of 2000, the Planning Committee opted for October 2000 as the most convenient date for conferees and speakers. This was confirmed by experience; unusually few scheduling conflicts were reported by participants.

The region encompassed by the Second Western Regional Conference was identical to that of its predecessor in 1993: the nine states within the territory embraced by the United States Court of Appeals for the Ninth Circuit.[5] Unlike the 1993 Conference, however, the delegations from each state were intended to be of equal size: eleven conferees per state, of which six were selected by the state's Chief Justice, and five by the Chief Judge of the Ninth Circuit in consultation with the state's federal judges.[6]

The theme selected by the Planning Committee, "Sharing Ideas and Building Communication," reflected the committee's desire to focus on enhancement of state-federal judicial relationships from a distinctly interjudicial perspective. For this reason the conferees were all drawn from the ranks of judges, clerks, and court administrators.[7] Judges of state trial courts, intermediate appellate courts, and courts of last resort were present, as were federal bankruptcy, magistrate, district, and circuit judges.

PROCEEDINGS OF THURSDAY, OCTOBER 12, 2000

I. WELCOMING REMARKS

Hon. Judith McConnell, Conference Co-Chair and Judge of the Superior Court of San Diego County, California

As co-chair of the Planning Committee and presiding officer for the first day of the Conference, Judge McConnell welcomed the conferees on behalf of the Planning Committee. She expressed the committee's appreciation for the funding of the conference by the State Justice Institute, without whose support the conference would not have been possible.

Judge McConnell reviewed the background of the movement to improve state-federal judicial relationships in the Orlando Conference of 1992 and the first Western Regional Conference of 1993. She extended a special welcome to one of the present conferees, Judge Susan P. Graber of the Ninth Circuit Court of Appeals, who as a state judge had served as co-chair of the Planning Committee for the 1993 Conference.

Judge McConnell summarized the mission of the conference as "to help stimulate debate and discussion on where we can go further in improving federal-state judicial relations, and, as a result, in improving public confidence in our courts. Our plan is to showcase what is happening, and to see what we can replicate elsewhere." To this end, she emphasized that the

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[5]Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

[6]Actual attendance closely matched the intended size of state delegations, with each state having either ten or eleven conferees. The number of state-court conferees per state varied from five to six; the number of federal-court conferees per state varied from four to five.

[7]Members of the bar were invited as speakers and participated fully in all sessions as guests, but were not formally among the conferees.

state-by-state breakout groups were an especially prominent part of the conference program, and were intended to promote intercourt communications within each state's judicial community.

II. JUDGING SCIENCE: JUDGES AS GATEKEEPERS

Moderator: **Hon. Philip M. Pro, Judge of the United States District Court for the District of Nevada**

Speakers: **George E. Berry, Esq., Dickson, Carlson & Campillo, Santa Monica, California**

Barry J. Nace, Esq., Paulson & Nace, Washington, D.C.

Dr. Manfred Zorn, Ph.D., Lawrence Berkeley National Laboratory, Berkeley, California

Dr. Haydeh Payami, Ph.D., Oregon Health Sciences University, Portland, Oregon

Hon. Robert E. Jones, Judge of the United States District for the District of Oregon

This program was organized into four successive presentations. Messrs. Berry and Nace spoke first, in point/counterpoint fashion. Dr. Zorn and Dr. Payami then made solo presentations accompanied by slides. Dr. Payami then joined with Judge Jones to conduct a mock hearing at which a judge examines a purported scientific expert.

Messrs. Berry and Nace: *Daubert* Revisited

Messrs. Berry and Nace were trial counsel for defendant Merrell Dow Pharmaceuticals, Inc. and plaintiffs William Daubert, et al., respectively, in the Bendectin litigation. In the first of the three appellate opinions in the case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, reported at 951 F.2d 1128 (9th Cir.1991), the court of appeals affirmed the inadmissibility of the plaintiffs' proffered scientific evidence that the defendant's product, Bendectin, had caused the limb-reduction birth defects of the plaintiffs' infants. Although this judgment was vacated and remanded by the Supreme Court, 509 U.S. 579 (1993), on remand the court of appeals again held the plaintiffs' proffered evidence inadmissible, 43 F.3d 1311 (9th Cir. 1995).

The Supreme Court held in *Daubert* that the adoption of Rule 702 of the Federal Rules of Evidence had altered the former practice in federal courts, whereby the admissibility of scientific evidence was tied to its "general acceptance" by experts in the field, under the rule of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). This had generally been construed to permit the admission of scientific evidence only if based on data or methodologies that had been published in the scientific literature and hence exposed to the critical evaluation of experts other than the one proposing to testify in court. Under Rule 702 as construed in *Daubert*, the admissibility of scientific evidence is conditioned on the trial judge's independent determination of the reliability of the evidence, which may or may not exclude admission of scientific evidence that has not been subjected to peer review by other experts.

Speaking first, Mr. Berry presented a general overview of *Daubert* and the Bendectin litigation. He summarized the nonexclusive list of four factors that *Daubert* prescribed for trial judges to consider in deciding whether to admit scientific evidence: (1) whether it is based on a theory or technique that can and has been tested; (2) whether the theory or technique has been subject to peer review and publication; (3) whether the theory or technique is subject to a known rate of error; and (4), echoing the old *Frye* test, whether the theory or technique is generally accepted within the scientific community. He noted that courts of the nine states represented at the conference were in marked disagreement over acceptance of the *Daubert* standard as a matter of state law. *Daubert* had been followed in Alaska, Montana, and Oregon, but rejected in Arizona, California, Idaho, and Nevada. Washington remains undecided, while Hawaii has retained a five-factor standard that preceded *Daubert* but is very similar to it. In sum, *Daubert* remains a minority rule among the states.

Mr. Berry asserted that the debate on Bendectin was over, and that it had been shown overwhelmingly by legitimate scientific evidence to be an innocuous drug. He identified several substantive areas of likely future controversy over scientific evidence: first, opinion evidence dealing with medical malpractice and psychiatric conditions, because such evidence tends to be based on experience rather than generally accessible data; second, diseases with subtle, subjective symptoms; and third, handwriting analysis — which may seem quite familiar and evidentially routine, but actually looks quite suspect when tested against the four *Daubert* factors. Mr. Berry also identified an area in which procedural controversy is likely to arise: research that has been submitted for publication but not yet published. He noted that scientists and journals are very protective of material in press. Can and should judges subpoena such material when asked for in conjunction with a *Daubert* hearing?

Another interesting question arises at the intersection of substantive and procedural controversy: how readily should seemingly settled issues of scientific acceptability be reopened for debate? Scientific consensus is not static. The pendulum of informed opinion has swung decidedly away from the once-prevalent views that saccharin is harmful and that Freud's theories of repressed memory are valid; a similar sea-change in opinion may currently be underway as to certain forms of statistical analysis used in DNA comparisons and to detect carcinogens. Mr. Berry concluded that judges are going to have to act as gatekeepers whether formally instructed to do so, by *Daubert* or analogous state rule, or simply incident to making the old *Frye* determination of the "general acceptance" of the scientific basis for disputed evidence.

Mr. Nace did not concede that Bendectin had been proved harmless as a matter of science. He argued that scientific evidence was intrinsically debatable, and said that the decisions made by the courts in these cases were ultimately political rather than legal decisions. He had tried ten Bendectin cases, winning five and losing four, with one mistrial. One of the four losses was the proper outcome, and while the other three losses should have resulted in verdicts for the plaintiffs, the outcomes were understandable. His conclusion was that juries are more trustworthy than courts in these matters, and that judges acting as gatekeepers should be wary about usurping the role of the jury by making scientific judgments for which a judge is no better qualified than a jury.

Dr. Zorn: Sources and Limits of Genetic Knowledge

Dr. Zorn is Co-Director of the Center of Bioinformatics and Computational Genomics at the Lawrence Berkeley National Laboratory. Based on his work on the Human Genome Project, he presented a series of insights and cautions for judges to consider when dealing with scientific evidence. He began by observing that there is often tension between truth and conventional

wisdom as to biological matters, for three reasons. First, "biologists dislike generalizations." Second, "the truth in biology is always more complex than generalizations about it." And third, "it is hard to distinguish between fact and fashion in biology." He emphasized that all biology is special, in a serious empirical sense, because life is characterized by variation. This results from four factors: individuality, historicity, contingency, and the vast volume of information that constitutes each individual organism, such that none is simply the product of the law of averages. "Every living thing is genuinely unique."

For individual human beings, these principles and their impact on human destiny are captured by the phrase: "Nobody starts out being 25 years old." A person is an individual at birth, sharing certain characteristics with other humans but also differing genetically from all others, except an identical twin. Then that person experiences a 25-year history which is different from that of all others, including an identical twin, because of the contingency of life. And as that person's life continues to unfold, genetic variation and a contingent environment combine to make prediction a matter of probability rather than fact. Dr. Zorn deployed a colorful set of slides to illustrate these propositions by reference to the Human Genome Project, what it had discovered about the three billion bases that make up human DNA, and how variously minuscule or complex are the known variations and mutations that cause or contribute to such health problems as sickle-cell anemia, cystic fibrosis, and cancer. He pointed out the paradox that, because of the complex interaction of genes fixed at conception and a contingently experienced environment, "all cancer is genetic, but not all cancer is inherited."

Dr. Zorn maintained that the exploration of genetic bases of behavior, although still in its earliest phases, is unlikely to yield definitive conclusions or an entirely objective model of why people behave as they do. Psychologists, he observed, "tend to emphasize the overwhelming importance of the environment . . . until they have their second child." The proper biological perspective is that "genes predispose, but they do not predetermine." In his view, "nothing happens in isolation: not genes, not development, not behavior." The upshot is that "life is the sum of genetics, education, environment, opportunity, and . . . ." Because chance and the unknown play such a large role in life, nonscientists in general, and judges and jurors in particular, should remember that "it is never all genetics."

Dr. Payami: Legal Problems of Genetic Testing

Dr. Haydeh Payami is Professor of Genetics and Neurology at Oregon Health Sciences University and Director of the NeuroGenetics Program of the Oregon Aging and Alzheimer Disease Center. She discussed her work in studying genetic bases for Alzheimer's and Parkinson's diseases, with particular emphasis on the legal status of genetic testing that might reveal a person to be at special risk of developing one of these dreaded diseases. She conducts such testing solely for research purposes, and keeps the results confidential even from her subjects except where they are clinically relevant to treatment of the subject or family members, or when a judge orders her to reveal the results.

Judicial power to coerce revelation of confidential genetic information is an important and recurrent source of conflict between science and the law. Dr. Payami explained that she holds no patent, owns no shares in biotech companies, and does no commercial testing. "The only reason I'm here is because, like you, I'm afraid. I would like you to know what is coming down in the future, so you'll have time to think about it until it really shows up in your courtroom. I'm not an advocate for gene testing, nor am I saying it shouldn't be done. But there are a lot of social, legal, and ethical implications that need to be considered."

Dr. Payami concurred with Dr. Zorn that, in her words, "it's easy to get genetic data, but it's not easy to get genetic knowledge." One of the risks of a rush to genetic testing is that the results are commonly misinterpreted. In a study of one of the most common and best known genetic tests, for a mutation associated with colon cancer, one-third of physicians misinterpreted negative results. This reflects the complex interaction between multiple genes and the environment that underlies such diseases and disorders (some involving multiple diseases) as cancer, hypertension, stroke, and Alzheimer's — which is actually a heterogeneous disease whose manifestations fall into three major categories according to age of onset. There are four different genetic tests that are generally viewed as satisfying *Daubert*'s four legal criteria for admissibility. Three look for rare mutations that are so closely correlated to Alzheimer's as to appear to be causes. But most Alzheimer's victims have none of these genes. The fourth gene is associated with higher risk and earlier onset, but its presence does not predict Alzheimer's, and its absence does not preclude Alzheimer's.

This range of variation and certainty makes disclosure of test results highly problematic. Potential benefits of disclosure are (1) close monitoring and early treatment of at-risk individuals; (2) satisfying the need to know of individuals with family risk factors; (3) informed family planning; and (4) peace of mind when results are negative. Potential risks of disclosure are (1) guilt resulting from negative results for some but not all related individuals; (2) anxiety, depression, and possible suicide resulting from positive results; (3) family discord; and (4) discrimination if positive results become known to third parties.

Dr. Payami concluded that genetic testing should be conducted only after careful counseling of potential subjects. There is clinical evidence that when all the countervailing risks and benefits are properly disclosed, as many as 80 percent of potential subjects will decline genetic testing that will reveal whether or not they have an incurable disease.

Judge Jones and Dr. Payami: Demonstration of a Hearing on Scientific Evidence

Judge Jones and Dr. Payami collaborated to demonstrate the content and conduct of an adversarial hearing on the admissibility of scientific evidence. The hypothetical defense motion, made pursuant to Federal Rule of Civil Procedure 35 in a case in which the plaintiff's claim for damages had placed in issue the duration of the 40-year-old plaintiff's life expectancy, requested the judge to order genetic testing to determine if the plaintiff had one of the three genetic mutations that makes early-onset Alzheimer's disease virtually certain. Two of the plaintiff's four siblings had already been diagnosed with Alzheimer's at ages 45 and 47. The plaintiff's father and aunt exhibited Alzheimer's symptoms at similar ages. The mock hearing also raised issues of the scientific validity of the requested genetic testing, pursuant to Federal Rule of Evidence 702, and of the relative balance of the probative value and prejudicial effect of evidence of the results of the testing, pursuant to Federal Rule of Evidence 403.

Among the issues raised and (in "sidebar" discussion) elaborated by Judge Jones and Dr. Payami in their mock hearing were: the relevance of family history in determining the likely probative value of genetic testing; the general consensus that judges cannot properly order the involuntary testing or other examination of family members in order to determine the medical family history of a party whose health is in issue; the difference between a 99-percent and a 100-percent probability that a given mutation will cause early-onset Alzheimer's (based on the single known case of a person with such a mutation remaining unaffected at age 68); and the capability of juries properly to weigh such evidence of very high but not absolute risk, given jurors' generally accepted capacity properly to consider evidence of other dangerous behaviors of somewhat lower statistical risk, such as heavy smoking and drinking. No vote of the conferees was taken after the demonstration, but Judge Jones reported roughly a 60/40 split

in favor of ordering the testing when a vote was taken after a similar demonstration at a previous judicial conference. At present there is virtually no case law one way or the other.

In closing, Judge Jones prompted Dr. Payami to describe DNA databanks. Volunteers donate blood, which can be analyzed postmortem — *after* the subject's medical history has written itself — to determine what genetic factors may have influenced that history. This permits genetic testing to proceed free of concerns that the testing itself, or disclosure of its results, will also influence the future medical history of the subject. Dr. Payami's own databank has more than 1000 samples collected over a 13-year period, and to date has produced no confidentiality or early-disclosure problems.

III. JURY TRENDS AND INNOVATIONS

Moderator: **Hon. Judith McConnell, Judge of the Superior Court of San Diego County, California**

Speakers: **Hon. B. Michael Dann, Retired Judge of the Superior Court of Maricopa County, Arizona and Visiting Fellow, National Center for State Courts, Williamsburg, Virginia**

Hon. John M. Roll, Judge of the United States District Court for the District of Arizona

In 1995, the Arizona Supreme Court approved sweeping changes to the state's jury trial system.[8] The speakers discussed the experience of Arizona's state courts with these new ways of managing juries and conducting jury trials, and offered their personal perspectives and recommendations regarding jury trends and innovations that other jurisdictions might consider adopting.

Judge Dann began his presentation by emphasizing the stark contrast between the presentation of information to juries and to college students. The familiar jury system, in which virtually everything relevant to sound learning is concealed — what the subject is, who the teachers are, what the point of the exercise is, how long the class will take, what will be on the examination, when it will be given, with discussion among the students banned and notetaking prohibited — would be summarily rejected in any college classroom.

Judge Dann referred to a "Learning Pyramid" to illustrate the relative effectiveness of learning when information is conveyed to adults by different means. The average retention rate of information conveyed by lecture is only five percent. This increases to 10 percent by means of reading, 20 percent by means of audio-visual presentation, 30 percent by a demonstration, 50 percent by a discussion group, 75 percent when learning is practiced by doing, and 90 percent when students put learning to immediate use by teaching others.

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[8] *See generally* Valerie P. Hans, Paula L. Hannaford & G. Thomas Munsterman, *The Arizona Jury Reform Permitting Civil Jury Trial Discussions: The Views of Trial Participants, Judges, and Jurors*, 32 U. MICH. J.L. REF. 349 (1999); Howard Ross Cabot & Christopher S. Coleman, *View From the Trenches: Arizona's 1995 Jury Reform Can Be Deemed a Success*, ARIZONA JOURNAL, July 12, 1999, at 6. All conferees received copies of these articles, as well as copies of the ARIZONA JURY TRIAL REFORM RULES that became effective on December 1, 1995.

In light of this knowledge of how adults best process information, Judge Dann proposed the following set of jury trends and innovations:

- Jury Tutorials
- Pre-instructions
- Note Taking
- Juror Notebooks
- Questions by Jurors
- Deposition Summaries
- Discussions of Evidence During Trial
- Copies of Instructions
- Dialogue/Reopen Upon Impasse.

These reforms would all contribute the more general objective of changing jurors' experience from the traditional passive model to a more active model of learning and understanding whatever is necessary to perform their functions appropriately. Various of these trends and innovations pioneered in Arizona are currently being considered for adoption in California, Hawaii, Oregon, Colorado, Washington, and the District of Columbia.

Judge Roll noted his unease about an innovation not on Judge Dann's list that is permissive in Arizona state courts: the mini-statement by which attorneys outline key issues to potential jurors at the voir dire stage. Judge Dann partially concurred in Judge Roll's concern; in his view such mini-statements were useful in complex litigation, but not in routine cases.

The speakers agreed about the pros of the first innovation listed above, "jury tutorials," and about the cons of another innovation not on Judge Dann's list, the use of dual juries.

A jury tutorial consists of a presentation to the jury of background information by a neutral expert selected by the court. This might consist of a primer on DNA evidence, or on the economic basis for evidence in business litigation. Both judges thought such a briefing could be useful in an appropriate case, to prepare a jury for hearing technical evidence.

A dual jury is used in lieu of severance when some evidence as to one codefendant is inadmissible as to the other. Judge Roll expressed the concern, shared by Judge Dann, that trial to a dual jury increases not only the likelihood that inconsistent verdicts will be perceived to be unjust, but also the likelihood that jurors who are excluded from hearing certain evidence will place undue significance on proceedings held in their absence.

In Judge Dann's view, the single most controversial of the Arizona jury-trial innovations is that of permitting jurors to discuss the evidence among themselves while the trial is proceeding. The 1995 reforms permitted juror discussions during trial only in civil cases, but the Arizona Supreme Court is now considering extension of the reform to criminal cases as well.

> How does this work? Well, obviously it starts working by turning the traditional admonition on its head or abolishing it. Jurors are no longer told that they must not talk to each other during the trial until deliberations begin. We continue to tell them, of course, they must not talk to anyone else other than fellow jurors. We tell them why and so forth.
>
> We tell them that regardless of what they've heard in other cases or seen on TV or read about, the law has been changed in Arizona to permit jurors, during trials like this — civil trials like this — to discuss the evidence as it — as they hear it, in the jury room when all are present and so long as they don't make up their minds about who should win or lose this civil case until you've heard everything and your deliberations have begun.
>
> And we tell them why it's important to wait — asked them to think about real-life experiences where they've made important decisions affecting business or their families without having all the information. And once they get all the information, they wish they hadn't pre-judged — made up their minds prematurely. And remind them it would be unfair and unwise to pre-judge this case until you've heard everything.

Judge Dann reported that discussions during the course of trial are very popular with the jurors, and lead to much greater cohesiveness of jurors during breaks in trial. Instead of disaggregating, they march off en masse to the jury room, close the door, and start talking to each other. Arizona is treating the innovation as an experiment to be studied closely. Research is in progress, with selected jury discussions and deliberations being carefully videotaped and studied by leading researchers.

> But it is controversial. To my knowledge, no other state has yet adopted it. They're taking a wait and see attitude wanting Arizona to be the guinea pig on this one, and it looks like we'll have to play that role.

Judge Roll declared that his reservations about mid-trial jury deliberations were greatest with respect to criminal trials, because the deliberations would likely include alternates who would be excluded from the final, dispositive stage of deliberations. This is not a problem in civil trials, where alternates are not impaneled. On the other hand, there is merit to the argument that jurors are going to discuss the case during trial whether instructed to or not, and therefore it is better to have these discussions take place legitimately, pursuant to appropriate admonitions and standards, rather than to have them occur sub rosa and without any guidance or regulation at all.

Judge Roll's pick of a hot-button innovation — and one he had tried using himself — was the questioning of witnesses by jurors. He found it to be problematic, for the reasons stated in a leading case decided by the Second Circuit.[9] It may entrench jurors in an adversarial role as quasi-prosecutors (or defenders) rather than as neutral evaluators of the evidence, may force less aggressive jurors to adopt an inquisitorial role in order to avoid seeming passive, and may encourage the formation of early opinions of the weight of the evidence that jurors are recalcitrant to change after all the evidence is in. It also leads to a daisy-chain problem of whether to allow jurors to interrupt counsel to ask questions, and whether (if juror questioning

[9]*See* United States v. Ajmal, 67 F.3d 12, 14-15 (2d Cir. 1995) (holding district court's encouragement of juror questioning of witnesses to be an abuse of discretion).

is postponed until counsel are finished) to allow counsel to ask follow-up questions after jurors' questions have been submitted to witnesses.

Judge Dann defended juror questioning, and pointed out that the conservative view of the juror's role that dominates the Second Circuit and other northeastern jurisdictions is hostile even to the innocuous practice of juror note-taking. There are many simple prophylactics to the problems mentioned by Judge Roll and the Second Circuit. The questions can be put in writing and submitted to the judge during recess. The jurors should not sign their names. The judge can review the questions with counsel out of the presence of the jury, and allow them to ask the questions themselves if they choose. Often counsel agree the questions are good ones, filling a gap that counsel failed to notice, and can give counsel insight into the jury's thinking. It may reveal potential juror misconduct, but that too is a plus — better to have it revealed and subject to a remedy than to remain hidden. In general jurors' questions are narrow and fact-based, are not argumentative, and facially do not favor either the plaintiff or the defendant, the prosecution or the defense.

IV. STATE-BY-STATE SMALL-GROUP REPORTS

Moderator: **Prof. John B. Oakley, Conference Reporter, King Hall School of Law of the University of California at Davis**

Reporters: **Hon. John Sedwick, Judge of the United States District Court for the District of Alaska**

Hon. Stephen McNamee, Chief Judge of the United States District Court for the District of Arizona

Hon. Cecilia Castellanos, Judge of the Superior Court of Alameda County, California

Hon. Darryl Y.C. Choy, Judge of the Circuit Court for the First Judicial Circuit, Honolulu, Hawaii

Hon. N. Randy Smith, Judge of the District Court for the Sixth Judicial District, Pocatello, Idaho

Hon. Ralph B. Kirscher, Chief Bankruptcy Judge, United States District Court for the District of Montana

Hon. Charles M. McGee, Judge of the District Court for the Second Judicial District, Reno, Nevada

Hon. Ancer Haggerty, Conference Co-Chair and Judge of the United States District Court for the District of Oregon

Hon. Daniel J. Berschauer, Judge of the Superior Court of Thurston County, Washington

The delegations from each state met as a small group for 75 minutes to discuss the first day's program. They were asked to consider and report back to the conference as a whole their

state's responses to three questions about the substantive content of the first day of the conference. First, what was the most significant topic discussed or point raised? Second, what was the most significant problem to which they had been alerted? And third, what were the most promising solutions to that problem?

Alaska

There is no disparity in Alaska between state and federal courts in the reception of scientific evidence: both systems apply the *Daubert* standard. The Alaska conferees focused instead on jury trial issues.

Alaska faces unique issues in selecting jurors and administering juries. There is extraordinary cultural diversity among its citizens, with many people from indigenous backgrounds, and many immigrants from the mainland who bring non-Alaskan cultures with them. Language differences may complicate this cultural diversity, as may the accommodation of physical disabilities of jurors, especially with regard to speaking or hearing disabilities that complicate the translation process.

A number of administrative issues associated with jury trial have special significance in Alaska. First, Alaskans value their privacy. Intrusive jury-selection questionnaires are offensive to potential jurors. Second, the great distances from which potential jurors may be summoned, often at great public expense and personal inconvenience, make it especially important to devise fair and uniform juror selection procedures applied with rough similarity by state and federal courts. There is a great deal of ad hoc variation at present between judges, even judges of the same court system. It would be a positive development for judges to share more systematically their experience and expertise in jury selection practices.

The Alaska contingent was in sympathy with the main thrust of the Arizona reforms, some of which are already familiar in Alaskan practice. For instance, most judges in Alaska allow jurors to take notes, and there is a general commitment to making the experience of serving as a juror a pleasant and meaningful one. The reformulation of standard jury instructions in "plain English" was thought to be a positive step in this direction, as was the practice of having the court meet with jurors to discuss the trial and answer questions after the jury's verdict has been announced.

Arizona

The Arizona contingent thought that state-federal disparities in the admissibility of scientific evidence, and in jury trial practices, could potentially create forum-shopping incentives. State and federal practice in Arizona is diverging in both of these areas: state courts follow the old *Frye* standard rather than the new federal *Daubert*, and of course Arizona's state court is a leader in experimenting with jury trial reforms. These disparities have not yet reached the point where they appear to be significantly influencing litigants' choice of forum.

There was consensus within the Arizona delegation that perceptions are important, and that care needs to be taken that jurors and other justice-system participants understand and appreciate how the system strives to achieve fairness through what may otherwise seem to be arcane procedures. It was also agreed that modern science poses very challenging issues, and that judicial education programs dealing with scientific evidence are useful and should be encouraged.

The delegation agreed that jurors should be paid more, to better reflect the important public service that jurors perform and the resulting economic hardship some jurors face. It was also agreed that jury administrators play a key role in creating positive judicial relations with jurors — a role that deserves more applause and encouragement. The delegation was split about the merits of judges talking with jurors after the trial. But there was agreement that, if this was allowed, there should be clear guidelines setting the parameters for such a discussion. The fact that the trial has concluded does not assure that post-trial motions won't be filed. Such motions may call into question what all or certain jurors did and knew, and thus turn the trial judge into a witness about post-trial conversations with these jurors held in the judge's own courtroom.

California

There was consensus within the California delegation that setting time limits on each side's presentation of evidence, and holding attorneys to those limits, was a good idea and popular with jurors. In California interim statements by attorneys in complex cases is an innovation found more in federal court than in state court; on the other hand, state rather than federal courts are more likely to permit jurors to question witnesses by submitting written questions to the judge. There was no support for the use of dual juries.

There also was consensus that the amount and significance of scientific evidence proffered in court was sure to increase, and that judges would benefit from being educated out of court about the nature and significance of the evidence they are sure to confront in court. Formal educational programs are a less dubious means of judicial education than judges searching the internet on their own in search of scientific insight — a practice that might threaten judicial impartiality and turn an adversarial model of trial into an inquisitorial one.

Hawaii

Hawaii's recent territorial heritage and insular geography has ensured a constant flow of state judges to the federal bench. As a result, there is a high degree of harmony between the state and federal judiciaries, and few controversies about scientific evidence, jury trial procedures, or other issues that might produce conflicts were state and federal courts to operate in isolation from each other.

Genetic evidence is frequently used in Hawaiian state courts, especially in family courts, where the gains in reliability and efficiency have been phenomenal. The Hawaiian state judiciary is sponsoring an international conference on genetics in 2001, and in typical Hawaiian fashion the federal judges have been invited to participate.

Two state judges, one from Maui and one from Oahu, are currently engaged in experimental use of the major jury innovations pioneered by Arizona. This is a pilot project, closely observed but not yet followed by other state judges and the federal judiciary. Jurors are being polled as part of the project, and their reaction so far has been almost universally positive.

In a number of areas Hawaii's state and federal courts are working together constructively: paralegal certification, attorney discipline, alternative dispute resolution, and prompt notice of bankruptcy stays and dispositions. Courts and prosecutors are also working together to achieve a sensible allocation of drug cases between the state and federal courts according to the nature of the offense, given that state courts emphasize treatment and federal

courts have stiffer mandatory sentences. A nagging problem neither system has yet solved is a high rate of nonappearance in response to juror summonses.

Idaho

A number of jury trial innovations are being used in Idaho, particularly by federal judges in civil trials. Permitting jurors to submit questions has been found to be successful, and is popular with attorneys as well as jurors. It gives counsel insight into what jurors are thinking. Care needs to be taken to make sure the inquisitive jurors cannot be identified. Allowing judges to discuss the case during trial is more questionable; the general view is that it needs further study. Most judges in Idaho allow jurors to take with them copies of instructions. Only one judge allows jurors to use summaries of depositions. There is support for permitting mini-statements by counsel before each witness in a long and complex trial. There has been no use of such a mini-statement prior to voir dire, nor of a neutral expert to give a tutorial to the jury on the nature of scientific evidence.

There was considerable enthusiasm to improve the interchange of ideas and innovations between state and federal courts in Idaho by having more regular judicial conferences and training sessions, circulating newsletters and press releases to all judges of both systems, exchanging jury handbooks and questionnaires, and coordinating committee work on matters of common interest such as jury trial administration, interpreters, courtroom technology, and diversity issues. In theory the two systems have different standards for admitting scientific evidence, but no conflicts have yet arisen.

Montana

The Montana delegation expressed concern that the jury's substantive role in the judicial system needs protection, and that the procedures under which juries operate need enhancement. Judges should err on the side of admissibility when it comes to scientific evidence: the delegation specifically cautioned against "too much gatekeeping." Where the admission of scientific evidence should be limited, however, is when it threatens the privacy of family members and other nonparties. The jury's performance of its factfinding role could be enhanced by making available to juries the sort of technological enhancements — high-tech video displays and the like — now being installed for use by judges but not by jurors. There was general consensus, however, that the use of court-appointed "neutral" experts to give tutorials to the jury on technical issues would be problematic. This was something that Montana judges had little or no experience with.

The timing of instructions to jurors should be optimized to improve juror understanding, and jurors should be treated in ways that show concern for and appreciation of their function. For instance, they should wear name tags so that members of juries can get to know one another by name more quickly, and refreshments should be provided in the jury room throughout trial.

Nevada

Nevada's conferees agreed that scientific evidence was not a divisive issue in their state. Although Nevada's state courts had rejected the *Daubert* standard, its state counterpart differed very little from a practical perspective of what evidence was admitted or barred.

Arizona's jury reforms dominated the delegation's discussions. They were generally opposed to permitting juries to begin discussing the case before the formal deliberative phase,

and to permitting mini-opening statements during voir-dire. They also thought that reopening a trial for more evidence and argument after the jury has been charged (as opposed to simple reinstruction of the jury) was a slippery slope that should be avoided, and were generally adverse to the use of dual juries. On the other hand, they generally favored permitting jurors to submit questions (provided they were in writing), and permitting jurors to take notes (provided they were left behind and destroyed after the case was concluded).

Oregon

Many of Arizona's jury innovations are familiar to Oregon judges. The practice there is to permit judges great individual leeway in conducting trials, so most of the innovations had been tried at one time or another in Oregon. The only jury trial issue that proved controversial within the delegation was whether jurors should be allowed to discuss a case while the trial was proceeding, prior to the formal deliberative phase. Some judges favored a flat prohibition of this practice, rather than leaving it up to the discretion of individual trial judges on a case-by-case basis.

Oregon's delegation spent the majority of its time discussing the conceptual and philosophical issues lurking in the background of debates about scientific evidence, aided by the participation of Dr. Payami in their small group. Given the lack of any objective basis for resolving disputes of scientific truth, with every expert's view subject to refutation by another, it is tempting to leave contested claims of scientific truth to the jury. The fact remains that *Daubert* requires judges to play a gatekeeping role, which is often a very difficult function but one which the courts must conscientiously do their best to perform.

Washington

Arizona's jury reforms were not news to the Washington delegation. A state commission chaired by Washington's small-group reporter, Judge Daniel Berschauer, filed a report in July 2000 recommending 44 reforms in the selection and treatment of jurors and the administration of jury trials.[10] Many of these parallel the reforms already implemented by the Arizona courts or advocated in previous small-group reports, such as: raising juror pay; providing name tags and other aids to familiarization; permitting jurors to take notes, receive "mini-opening statements" from counsel at stages throughout long trials, and address written questions to witnesses; and protection of juror privacy. The Washington delegation placed particular emphasis on improved treatment of jurors, and on better use of pattern jury instructions. There was disagreement, however, about the benefits of permitting jurors to question witnesses.

Washington's delegation touched in two important respects on relations between state and federal courts. First, there was consensus that the state courts would benefit from emulating the practice of the federal courts in using pattern jury instructions, and where appropriate from borrowing the language of the federal instructions. Second, it was recognized that unnecessary friction was created between the systems by scheduling conflicts imposed on counsel by judges of one court system without regard to prior commitments to the other court system. It was agreed that these conflicts should be avoided by better communication between judges. There should be no assumption that federal judicial proceedings ought to have preemptive effect on parallel state proceedings, or vice versa.

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[10]The Report of the Washington State Jury Commission is posted on the World-Wide Web at <http://www.courts.wa.gov/jurycomm/report/home.cfm>.

PROCEEDINGS OF FRIDAY, OCTOBER 13, 2000

V. INTRODUCTORY REMARKS

Hon. Ancer Haggerty, Conference Co-Chair and Judge of the United States District Court for the District of Oregon

As co-chair of the Planning Committee and presiding officer for the second day of the conference, Judge Haggerty welcomed the conferees to the resumption of the conference. He briefed them on the various logistical details of attendance, including the processes for evaluating the conference's programs and speakers, and for obtaining reimbursement of the conferees' expenses. Judge Haggerty spoke for the entire planning committee in expressing its thanks to the principal administrative staff for the conference, all of whom worked on the conference in addition to their other tasks within the Office of the Circuit Executive for the Ninth Circuit: Assistant Circuit Executive (Legal Affairs) Robin P. Donoghue, Assistant Circuit Executive (Conference and Education) Renée Lorda, and Conference and Education Assistant Phyllis Riddell. Finally, Judge Haggerty noted that, in light of the rigorous schedule for the first day, the planning committee had humanely limited the second day's schedule to only two substantive programs before the concluding small-group discussions and reports.

VI. CAPITAL HABEAS CORPUS: THE THEORY AND PRACTICE OF FEDERAL - CONVICTION REVIEW IN DEATH-PENALTY CASES[11]

Keynote Speaker: **Prof. Larry Yackle, Boston University School of Law**

Commentators: **Hon. Stephen McNamee, Chief Judge of the United States District Court for the District of Arizona**

Hon. Joan Comparet-Cassani, Judge of the Superior Court of Los Angeles County, California

Moderator: **Prof. John B. Oakley, Conference Reporter, King Hall School of Law of the University of California at Davis**

Professor Oakley began the program by noting that the planning committee had decided that federal habeas corpus review of state-court criminal convictions was "a true fault line in state-federal judicial relations," especially in the capital-habeas context, where federal courts were reviewing convictions in which a death sentence had been imposed at the trial level and affirmed by the state court of last resort. He introduced the keynote speaker, Professor Larry Yackle, who addressed the Anti-Terrorism and Effective Death Penalty Act 0f 1996, known as AEDPA[12] .

PROFESSOR YACKLE: Thank you, John, and thanks very much for inviting me. I'll do what I can by you this morning in the way of a keynote address.

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[11]Professor Yackle's speech is reported verbatim.

[12]Public Law 104-132, 110 Stat. 1214.

I came west about this time last year. I stopped in Austin, Texas for a conference on federal courts generally — not just habeas corpus — at the law school there. The organizers of that event contrived to schedule my remarks at the very time the Red Sox were taking the field against the Yankees for a crucial playoff game. This year the organizers have avoided that kind of conflict by apparently terminating the Red Sox's season in September.

My thesis in Austin was not the thesis I'm going to advance for you this morning. My thesis in Austin was that federal habeas corpus, particularly in death penalty cases, is in chaos. There really isn't any coherence, any consistency to it. To make that specific, I can't find any discernible underlying intellectual foundation that explains and justifies the intricacies of federal habeas corpus doctrine, either doctrine that's established by the Supreme Court or by some of you, or doctrine that flows from AEDPA or any other federal habeas corpus statute.

You would have thought that there would be some discernible rationale here, some intellectual idea that does roughly explain most of this anyway, even if it's not perfect. It's not that there is no sense to it at all. Some doctrine, some ideas can be explained as efforts to ensure that the federal courts adjudicate federal constitutional questions, as efforts to ensure efficiency, as efforts to be sensitive to countervailing state interests, but there are just too many counterexamples It's a mishmash. There are doctrines and statutes that frustrate those very values, the very values one would have thought that habeas corpus law was in place to promote.

That's not a thesis though that I can advance for you. It's all right in an academic setting. You can stand outside the house and throw stones as an academic. And sometimes that works. It's all right. It's enough. It's not enough for you. You've got the real cases, the real people, the real problems to resolve, and you've got to decide these matters.

So I'm trying to come up with something that I can offer to you in the way of a keynote address that might plausibly, in some fashion, be helpful. I know that federal habeas corpus for state prisoners is a marvelously troubling matter, both for federal and for state judges. It can cause misunderstanding and occasionally friction. It's troubling, on many levels. And we ought to face up with to that. And this session certainly — explicitly — faces up to that.

But the world is a messy place. We have lots of problems, lots of trouble. Wasn't it Sam Spade, or Humphrey Bogart, who said that he doesn't mind a reasonable amount of trouble? We're going to have a lot of trouble with this stuff, but we can mitigate the difficulty if we think it through, identify problems, anticipate the kinds of misunderstanding and friction that can arise, and work these matters through. Maybe I can offer a few thoughts this morning in that direction.

A keynote address is supposed to be stimulating. I'm supposed to be provocative, to engage you in some way, to get you talking and to prepare you for the panel session to come. I don't know whether I can really do that, but I can offer you, I think, some observations about existing habeas corpus law and the role of the federal courts in it after the new statute — AEDPA, observations that I think are right, but may be controversial and may on first blush appear to be erroneous.

The basic observation is this. The role of the federal courts in habeas corpus has changed fundamentally under this new statute. The statute conceives of the role of federal courts differently from the role the federal courts had previously. And in particular, the new statute contemplates that federal judges will now have occasion much more often to examine

questions of state law — that federal judges will now have occasion to examine the behavior of state judges and state courts as they resolve state law questions. And certainly the new statute conceives that federal courts now will have occasion to reexamine state court behavior regarding federal questions.

Let's back up a little. If you go back to mid-century — I'm an academic, I'm allowed to be a historian — if you go back to Felix Frankfurter in *Brown v. Allen* in 1953,[13] there is a model for habeas corpus jurisdiction that is roughly, I think, familiar to most of us. The idea is that federal habeas corpus is an original form of jurisdiction. It's analogous to an ordinary civil action. It's initiated by a prisoner on petition, not a complaint. But in the main, it's an original form of jurisdiction like a civil action.

True, federal courts have occasion, in habeas corpus on this familiar model, to examine federal questions, federal questions that were or might have been adjudicated in state court previously. And that makes habeas corpus different. Habeas corpus is an exception to the full faith and credit statute. A preexisting state-court judgment does not get preclusive effect in habeas corpus.

On this model — on this conventional familiar model, this pre-AEDPA model — federal courts then cover ground that state courts previously covered or might have covered, but they do it coincidentally. Their focus is on federal questions, not on the behavior of state judges previously as they adjudicated federal questions. But rather federal courts focus on those federal questions, just examining the same issues that state courts might have or did examine previously.

On that familiar model there really isn't much occasion for federal judges in habeas corpus to examine questions of state law. There are some occasions. The exhaustion doctrine, for example, the typical requirement that prisoners exhaust state remedies before filing for habeas corpus relief in federal court. That doctrine does call upon federal judges to examine state court opportunities to litigate federal claims. So there's one instance in which federal courts, on the traditional, familiar model, had to examine state procedural questions.

As well, I think it's fair to say that in 1953 the "adequate and independent state ground" doctrine applied to habeas corpus. So if, for example, a state court declined to examine a federal claim on the ground that the prisoner committed procedural default, that state procedural ground of that decision might box off habeas corpus adjudication later. In order to enforce that doctrine in habeas corpus, federal courts had to examine the existence of state procedures and state-court enforcement of procedural rules.

There were other places in habeas law where federal courts examined questions of state law, with respect to fact-finding, for example. It was often necessary for federal courts to examine state fact-finding procedures. But in my view, most of that was around the edges. In the main, federal courts concerned themselves with federal questions, not really with state-law questions. And certainly in the main, federal courts did not second-guess state courts in any direct way, but instead just adjudicated federal claims independently — coincidentally, the same federal claims that the state courts might have adjudicated or did adjudicate previously.

I think that model prevailed until AEDPA. You can identify, I think, some other stops along the road. In 1963 the Court dropped the "adequate and independent state ground"

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[13]344 U.S. 443, 488 (1953) (concurring opn. of Frankfurter, J.).

doctrine from the mix.[14] And to the extent that that doctrine had called upon federal courts to examine questions of state procedural law and to second guess state courts on their application of that law, that dropping of the doctrine mitigated — eliminated — that part of the federal court's responsibilities. And then in the middle 1970's the Court reintroduced the "adequate and independent state ground" doctrine,[15] and in that wise reintroduced those same responsibilities once again for federal judges. So it's kind of a wash, I guess. Again, though — I think that to the extent, on that familiar model, that federal courts examine questions of state law and state court behavior — it was on the margin.

I should tell you that some academics, even prior to AEDPA, thought that this familiar model that I've described to you missed the mark; that really, realistically, practically, federal habeas corpus for state prisoners was a form of appellate review; that federal courts really had essentially a jurisdiction to review state-court judgments on federal questions for error. You can make that case. It has a certain appeal to it. There's a kind of appellate flavor to this. There always has been.

After all, it's an exception. Habeas corpus is an exception to the full faith and credit statute. It contemplates, then, that federal courts are going to come along — sequentially, after the state courts have finished — and take up the same kinds of matters once again. So it has that sort of flavor.

I, for one, never thought that the appellate model captured habeas corpus. I thought that the familiar model that you attached to *Brown v. Allen* and these other cases was more accurate, and I still think so. Certainly the Supreme Court never described habeas corpus as an appellate jurisdiction. According to the Supreme Court, the jurisdiction of district courts is exclusively original. There are no exceptions to that. And when the Supreme Court would explain the model for federal court activity it would always be on this familiar traditional model, not an appellate model.

Having said that, academics, Supreme Court justices, lower court judges, often use very loose language, and always have, about habeas corpus. They refer to habeas corpus as a kind of review. If a journalist gets hold of a habeas corpus case it's always "habeas corpus appeals." It's very hard, I think, in common parlance, to maintain the different model for habeas corpus that I've been describing.

The *Teague v. Lane* case in 1989,[16] and cases in that line since, stir this mix a bit. I don't want to forget the *Teague v. Lane* case. I think I'll be able to come back to that. Not that *Teague v. Lane* suggested an appellate model; I think not. But *Teague v. Lane* and pieces of that doctrine, I think, bear on the thesis that I want to advance this morning.

Enter AEDPA in 1996, a new federal statute. You have to take it on its face. Take its language seriously. Don't resist it. Accept it, as we all must, as authoritative federal law regarding the role of federal courts. Footnote: I don't like it. I don't like most of it, but it's there on the books and to be accepted and worked with. The problem that we have — that you have — is making sense of it, making it a workable body of law for these cases.

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[14]*See* Fay v. Noia, 372 U.S. 391 (1963).

[15]*See, e.g.*, Wainwright v. Sykes, 433 U.S. 72 (1977).

[16]489 U.S. 288 (1989).

QUESTION: Could you remind us what that stands for, please?

MR. YACKLE: Sure. The Anti-Terrorism and Effective Death Penalty Act of 1996. Congress has a way of coming up with some funny sounding names for statutes, and that's one. It included a lot of other provisions, but the big chunk in it was habeas corpus amendments.

AEDPA in 1996 includes a lot of provisions. And I think some of them, plainly read, contemplate a serious departure from the old model. There are lots of places, and I'm going to give you some illustrations this morning, where now federal courts really do have to examine and decide state law questions. They do have to second-guess state courts regarding questions of state law. And certainly they need to examine state-court treatments of federal issues in ways that are just quite different from the earlier model.

I don't think it's just a question of quantity. I think there's a qualitative change here. I think the model's different. I don't think it's an appellate model yet. There are lots of signals that even though federal courts may now be obliged to directly address state-court behavior, that this jurisdiction still isn't an appellate jurisdiction. It's not a routine authority to second-guess state-court judgments and turn them around for error. I think it would be a serious mistake to view AEDPA and the new model for habeas corpus in that way.

I don't think it's profitable to try to wedge the new role for federal courts under this statute into any familiar pattern. It might be a good analytic tool. Is it kind of like appellate review now, or more so? In what ways, in what ways not? Is it kind of like the old model? Is it kind of like something else? Those might be ways to examine and understand it, but I think the model itself is unique. The role the federal courts now have in these cases is unique, and we need just to understand it and do the best by it we can.

I want to give you two illustrations. The first — this is going to be a little tedious, but I'll get through it quickly — the first is the filing-deadline provisions in the new act. I think this is a good illustration of how it is that the new statute contemplates that federal judges are going to decide a lot of state-law questions and second-guess state courts regarding state-law questions.

If you've looked at it you know that under the new statute a prisoner typically must file a federal petition within one year after the judgment in state court becomes final after the conclusion of direct review. Well, these are terms of art. They are statutory terms now. "Final" is a federal statutory term; "conclusion of direct review" is a federal statutory term calling — for a determination of what those terms mean, certainly by habeas corpus courts implementing the new statute.

Nonetheless, those terms clearly contemplate an antecedent body of state law. It's not irrelevant, what counts as the conclusion of direct review in Arizona or California, if a federal court is trying to implement this new federal statute in a case arising from one of those states. As soon as you accept that premise, and I think we have to, necessarily then a federal court is going to have to examine state law.

What counts as the conclusion of direct review in a particular state? Is it a decision of an intermediate appellate court, or only the highest state court? Is it perhaps when the highest state court enters a decision, or some days after that when the clerk puts the proper stamp on it? In California I gather it's 30 days after that. How are those 30 days to be computed? There presumably are state rules for working out the computation of time periods. Federal courts

assume then that they have to examine the state statutes and the state rule books on the computation of time periods. They have to ask lots of questions.

Is it necessary that the parties be notified? What about petitions for rehearing? There are lots of state law questions tied up in the filing-deadline provisions, the basic provision that a prisoner has only a year in which to file. And on those state-law questions surely must be built an interpretation of the federal statute, and ultimately in any given case a determination whether the prisoner has met the federal filing deadline.

Under AEDPA the filing deadline, the federal statutory filing deadline, is tolled when there is a properly filed state post-conviction petition pending. Well, again, we have new federal statutory terms: a "properly filed" petition, a "pending" petition. These are federal statutory terms that call for a federal court's interpretation. Nonetheless, it's got to be true that anybody trying to interpret those terms in a given case is going to have to look to state law and practice.

You have to ask whether there is in this case a state procedure by which the prisoner can seek relief. How is it that the prisoner can file such a petition? Is there a filing deadline, for example. How's the filing period, if there is one, going to be computed? All of the same problems I went through just a moment ago arise at this different level with respect to the tolling provision.

Here, there are even more problems. Lots of these people of course are in prison. Does the "mailbox" rule apply? Is it that a prisoner in law is held to file a petition for state post-conviction relief when the prisoner puts his petition in the prison mailbox, or is it only when the clerk receives the petition? Maybe only when the clerk puts the proper stamp on it, maybe 30 days later? All of these are matters of state law, and federal courts necessarily are called upon to decide them.

Typically, as a matter of state law, there are other procedural hurdles that prisoners have to clear in seeking state post-conviction relief. For example, there may be procedural-default rules — a prisoner can't raise that claim in this posture because it wasn't raised at trial or on direct review.

Well, in order, presumably, to work through the tolling provision, the federal tolling provision, it's going to be necessary — I have a footnote to this in a moment — it may be necessary for a federal court to inquire into the intricacies of state procedural-default law in order to make a determination whether the prisoner has satisfied the requirements of state law. When is it that a state post-conviction proceeding is finished? All of these are matters of state law that federal courts are going to have to look at, I think.

Now the footnote. It may be that by interpretations of the federal statute some of the state-law issues will go away — will be irrelevant or immaterial to a federal court's work. I don't want to get too far ahead of myself, but there is a case pending in the Supreme Court now, the *Bennett* case from the Second Circuit, in which the question is, roughly: is a petition for state post-conviction relief pending — is it properly filed and pending in state court — if it is subject to dismissal on procedural grounds in state court?[17]

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[17]*See* Artuz v. Bennett, 531 U.S. 4 (2000). This decision was announced on November 7, 2000, nearly one month after Professor Yackle's keynote address to the Conference. The Court unanimously answered "Yes" to the question framed by Professor Yackle, ruling that an

Now if it turns out that it doesn't matter whether a petition is subject to dismissal on procedural grounds or not, if it turns out that the petition is properly filed if it's just there and still on the docket, then of course that would have the consequence of dropping out of the mix any necessity of examining state procedural law in that respect. If, on the other hand, the Court were to decide that a petition's vulnerability to dismissal on procedural grounds does gear into the tolling provision, such that a petition really isn't properly filed if it's subject to dismissal on procedural grounds, well, that would make it necessary for federal courts to get into whether or not a petition is vulnerable on that account in order to interpret and apply the tolling provision, the federal statutory tolling provision.

I don't want to prejudge *Bennett*. I just raise *Bennett* as an illustration of how it is that interpretations of provisions in AEDPA can on occasion increase or decrease the occasions on which federal courts may have to look at state law issues.

Well, questions of fact can arise touching the proper interpretation and enforcement of the federal filing deadline. What if a "mailbox" rule applies and there's a question of fact about that? The prisoner says that he put the petition in the mailbox on Friday and the guards all say it wasn't there until the next Monday, and it turns out that that's crucial. Will questions of fact arise?

They go then to whether or not, as a matter of state law, a petition was properly filed, filed within the prescribed state filing period, which in turn goes to whether or not the petition might operate to toll the federal filing deadline. These questions of fact related to questions of state law then necessarily come before the federal court, if the federal court is going to enforce the new federal statutory filing deadline.

I don't want to make this sound more complicated than it has to be. It really *has* to be this complicated. There is an old charge against federal-courts teachers that they're in the business of making things more complicated than they have to be — that's what they do. In this respect, it is true. Though, of course, in the typical case, by the time a federal court gets a petition from a state prisoner and the question arises whether that petition was filed in a timely way given the new deadline, the state courts may have passed on some of these state law issues in that very case. And they may also have determined any disputed questions of fact touching the filing deadline.

And of course the state courts are authoritative with respect to questions of state law. And certainly if it's clear what the state court has done with some question of state law, that may well speed this process along in that federal courts will, of course, accept that determination of state law and then just make the connection between that question of state law and the federal filing deadline.

It may also be true that the state courts have determined the necessary questions of fact. Remember, this isn't appellate jurisdiction. It isn't an occasion for just invoking the usual rule about accepting findings of historical fact by lower courts unless they're clearly erroneous, though there is a similar kind of statute that governs habeas corpus proceedings. Under the statute — and it was more or less this way before AEDPA, as well — under the statute, state-

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application for postconviction relief was properly filed in state court, and thus was effective to toll the limitations period otherwise imposed by AEDPA for the filing of a federal habeas petition, even though the claims thus presented to the state court were procedurally barred as a matter of state law.

court findings of historical fact are entitled to a presumption of accuracy. So it may well be that a federal court can accept the findings of fact made by state courts, and in that way defuse some of this difficulty.

Then again, the prisoner may be able to rebut the findings of fact and may be entitled to an opportunity to do that. And that of course can present further difficulties for federal courts trying to follow the statute, trying to work through it and to make it work. Federal courts may have to entertain arguments that the state courts just got the facts wrong. That may require hearings — at least taking additional evidence on these questions.

And these questions, understand, don't go to the merits of anybody's federal constitutional claim. They go to state-law issues touching state post-conviction procedures, which in turn go only to whether a federal filing deadline is tolled, which goes to the proper enforcement of the federal filing deadline, which of course only goes to whether the federal petition is filed in a timely way in the first instance. All of this has to be done before anybody is in a position to look at the merits of a claim. A lot more things beyond this need to be done, but this is all threshold stuff.

We're still not through. State courts, as they process state post-conviction petitions, have to apply state procedural law. And it may well be that they will do it in an inconsistent way such that, for example, they might find that a petition is out of time or dismissible on procedural grounds, and the federal court might regard that procedural ruling as inadequate — ineffective, not sufficiently independent — to cut off habeas corpus review. I tend to think that the same kinds of federal doctrine regarding default in other contexts, including the "adequate and independent state ground" doctrine, would apply here. I don't know that that's true, but it seems to me it would be.

And it might well be then that federal courts will have to second-guess state-court determinations of state procedural questions, all of this in the context of enforcing the filing deadline. So it's not the traditional, familiar kind of enforcement of default doctrine. It's not the "adequate and independent state ground" doctrine that I mentioned early on. It's that doctrine reproduced in another context, an antecedent context having to do just with the federal filing deadline.

Let me move on. The other illustration I want to give you is the big-picture statute, the new provision in AEDPA, § 2254(d)(1). This is the statute that was interpreted by the Supreme Court last term in the *Terry Williams* case. By the way, I did put a memo in your materials on the Court's cases last term, including *Terry Williams*.[18]

Under § 2254(d)(1) a federal court is barred from granting habeas corpus relief, with respect to a claim that was previously adjudicated on the merits by a state court, unless that adjudication on the merits resulted in a decision that was contrary to or involved an unreasonable application of clearly established law as determined by the Supreme Court. That's more or less it.

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[18]This document is entitled"Memorandum on the Supreme Court Habeas Corpus Decisions, October 1999 Term." It was prepared for the conferees by Professor Yackle on October 13, 2000, along with a parallel memorandum on recent habeas decisions of the Ninth Circuit. Copies of these memoranda may be obtained by writing to Professor Yackle at Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. Professor Yackle may also be contacted by fax (617-353-3077), by telephone (617-353-2826), or by e-mail (yackle@bu.edu).

I did a little memo on this early on. I always give my stuff to my wife to read over for typos. And she came to this — she's an attorney. She came to this language and let out a whoop, "Oh, how could anybody understand this. This would never get past a high school English teacher." And it wouldn't. But the answer of course is wait till you get to the provisions on hearings and successive petitions in federal court. Then come back, and this will look like Hemingway.

This is a blockbuster provision. It has enormous implications for the role of federal courts under AEDPA. It necessarily entails federal courts examining what state courts did as they adjudicated the merits of claims in state court. This is different from the familiar model — and I think it's quite different from appellate review. But it is a direct instruction to federal courts to attend to what state courts did previously.

I won't go into all of the details, but roughly it comes out this way: a federal court is barred from granting relief unless the federal court can say that the state court reached an unreasonable judgment with respect to a federal claim when the matter was in state court. I think I understand the background thinking here. It's familiar in itself.

The idea is that we have two sets of courts in this single system, state and federal courts. They're co-equal in status. Neither necessarily must defer to the judgments of the other. Each set of courts is subservient only to the Supreme Court itself. So if a federal court has a reasonable disagreement on a question of federal constitutional law with a state court, it isn't necessarily the case that the federal court is right and the state court is wrong. Only the Supreme Court, because it is the Supreme Court, gets to decide what is an accurate judgment in the end.

So I think the idea here — I think the idea here, if there is an idea — is that federal courts ought not just substitute their judgments in close cases for the judgments previously reached on the merits by state courts. But understand that the Supreme Court doesn't review all these cases.

This is a statute that instructs federal district judges what they're to do. And it tells them they are to judge whether this is more than just a reasonable disagreement, whether instead the state court has reached a judgment on a federal constitutional claim that is unreasonable. That is perfectly clear. It's for the federal court to make that judgment. I don't know how else it would have been done, or could have been done. But doing it this way is remarkably significant.

Now a federal court is asked — instructed — to examine directly what a state court did on a federal constitutional question, and to decide not just whether the state court got it wrong or right, not just decide whether you have reasonable disagreement about it, but whether the state court was off the charts, and acted unreasonably as it determined a federal constitutional claim.

That, I think, pits federal courts and state courts against each other in a remarkable new way that is very likely, I think, to add to the misunderstanding and friction that we're all of us concerned about. We'll see how it works out. My plea to you is just to recognize that that's what the statute prescribes. It's not something that federal district judges have come up with. It's not something that the Supreme Court came up with. This is the statutory command under AEDPA.

There are a couple of things that could happen with this arrangement. One, I think is what the Supreme Court in *Terry Williams* has in mind. I think it's also what the Ninth Circuit Court of Appeals had in mind in the *Van Tran* case a few months ago.[19] It's this: we will develop constitutional law in these criminal procedure cases on two levels.

There will be, if you will, the higher level: where constitutional law, the protections, the safeguards that defendants have, the content of those safeguards, is more capacious. That will be the accurate federal constitutional law. Then there will be a second level: a kind of shadow set of precedents on what is really not accurate constitutional law, but rather constitutional law that in the circumstances of a case was close enough so as not to be viewed as unreasonable.

I've got a bunch of second-year constitutional law students waiting for me back in Boston, and this far into the term they're already complaining that constitutional law is indeterminate. They just cannot predict Supreme Court results. They can memorize the doctrine, but even they know that the doctrine doesn't generate results. It's so much more complex than that.

I'm afraid that what we're asked to do by this new statute is to develop both a largely indeterminate, messy body of accurate constitutional law and then as well, at least in these criminal procedure cases, a shadow body of law that's somewhat off that mark. I have this fear. The fear is that federal judges don't want to be in the business of telling state judges that they've reached unreasonable results. It's one thing to disagree and to be in a position to determine that a state court has made a mistake. But to say the state court's mistake is not just a mistake, but an unreasonable mistake, is something else again.

I think there may be a psychological inclination on the part of federal judges not to say that. And I fear that one consequence — one practical consequence — might be that federal judges will tend, in order not to say that, instead to conclude that state courts weren't wrong at all. So that we won't have so much in the way of a two-level constitutionalism, but rather a more murky, single body of constitutional law, but it will sink down, the content of procedural safeguards will sink down to a lower common denominator. That, I think, would be most unfortunate. I don't think that the statute calls for that at all. If anything, the statute calls for the development of these two bodies of constitutional standards.

On this point, consider two Supreme Court cases just last term, the *Weeks* case[20] and the *Ramdass* case,[21] both habeas corpus cases. In those cases, on what the Court called the merits of constitutional claims, it decided that prisoners had unmeritorious claims on the merits, without getting into whether a state court might have made a reasonable mistake. Surely the state courts made no mistake at all, because the claims are unmeritorious now and were then, said the Court. The Court decided these cases, as I read them, on that ground.

Apparently the Court regards a determination of whether a claim is good and meritorious as antecedent to an examination, under the heading of § 2254(d)(1), of whether a state court reached a reasonable judgment when the case was in state court. That may be the

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[19]*See* Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000).

[20]*See* Weeks v. Angelone, 528 U.S. 225 (2000).

[21]*See* Ramdass v. Angelone, 530 U.S. 156 (2000).

way in which the Supreme Court means this to proceed. It may be that federal courts are not to jump to the question whether a state-court decision rendered previously was reasonable or not, but rather they are to begin with what they regard as the accurate analysis of the federal constitutional question — and then only if necessary go on to the question whether relief is nonetheless barred under § 2254(d)(1).

I will stop there. I should tell you that we have talked among ourselves up here and hatched a plan to engage you as much as possible in this next panel discussion. I talked a lot longer than I wanted to or that you wanted me to. Now it's time for you to get into this. We know that you have ideas and views, some of those views strong, and we ought to get that before us and have a good general exchange that extends to the full of the room. Thanks very much.

The panel discussion began. Chief Judge Stephen McNamee said that he wears four hats: (1) a district judge with a caseload, (2) the administrator and intake judge for the District of Arizona, (3) the current chair of the Ninth Circuit Capital Case Committee, and (4) the co-chair of the Ninth Circuit Oversight Committee on Budget and Capital Case matters.

He noted that in 1990 when he came on the bench there were very few capital cases going through the system, and at a very slow pace. The United States Supreme Court was actively reviewing challenges to death penalty statutes. Some of the cases did not have appointed counsel, and were automatically stayed. Others had big firm "volunteers." When the Supreme Court upheld the statutes, cases came flooding into the federal courts, which were ill equipped to handle them.

The Chief Judge of the Ninth Circuit had established a fledgling Capital Case Committee and Judge McNamee became the chair. The committee developed a set of model orders for most districts; recognized the need for specialized law clerks to handle these cases and developed a death penalty law clerk program; produced the Ninth Circuit Capital Punishment Handbook (now in its third edition); developed quarterly reports on the cases in each district; and provided CLE seminars for judges, staff, and attorneys. In addition, the committee addressed the way different states deal with their own habeas review, and worked with attorneys general, wardens, and state-federal judicial councils on such matters as time of execution.

Then-Chief Judge Procter Hug established the Ninth Circuit Oversight Budget Committee in direct response to Congress saying that the Ninth Circuit, and particularly California, was draining off too much of the budget for appointed counsel in capital habeas cases. The committee is composed of capital case law clerks, public defenders, private attorneys, consultants, and accountants. It developed a series of orders and model proceedings that reflect case management and budgeting matters. Each district must have a model plan for budgeting, and the committee provides training. The attorneys actually like this approach because it gives them an idea of what a case will cost and what compensation they can expect. Also, the federal public defenders are taking on more of these cases.

The state-federal judicial councils have been active in this area as well. For example, the Arizona council meets twice a year and always includes a capital case component. The

council has sponsored a joint training session for state and federal judges. The State of Arizona also hired some law clerks to advise trial court judges on capital issues. Judge McNamee encouraged everyone to find funds for death penalty law clerks because they are a valuable resource.

Judge McNamee noted the following "hot issues" in the federal system: opt-in litigation (chapter 154 of AEDPA provides that states that meet certain qualifications can have accelerated review of their capital cases); interpretation of statutes of limitation; deference to state court rulings; procedural default; evidentiary hearings; ineffective assistance of counsel claims; applications for investigative funds; and definition of a petition.

As for procedures in federal court, Judge McNamee said that when the petition is filed, execution is stayed with no opposition from the state attorney general. The press misinterprets the stay order and the law. They never note that the state did not object to the stay. There follows an answer, a traverse, and possibly a surreply. Then there are motions on the procedural issues. Procedural default issues have to be litigated. Finally the court addresses the narrow set of claims to be resolved on the merits. Out of 60 claims, 15 to 30 may be reviewed and determined on the merits. In California the federal courts will have more evidentiary hearings than in Arizona, which has a rule of court that results in most of the evidentiary hearings occurring in state rather than federal court. Following a merits resolution an appeal can be taken to the Ninth Circuit Court of Appeals, which is struggling with all of these cases.

Next, Judge Joan Comparet-Cassani spoke on the state judge perspective. She quoted from Brown v. Allen[22]:

> A state properly may deny habeas corpus to raise either state or federal issues that were or could have been considered on appeal. Such restriction by the state should be respected by federal courts.[23] . . . [T]his Court has sanctioned progressive trivialization of the writ until floods of stale, frivolous, and repetitious petitions inundate the docket of the lower courts and swell our own.[24] . . . However, reversal by a higher court is not proof that justice is thereby better done.[25] . . . [C]ourts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence. Nor is there any good reason why an identical contention rejected by a higher court should be reversed on the same facts in a lower one."[26]

Judge Comparet-Cassani noted that some issues between state and federal judges deal with and impact on the state's sovereign ability to apply and effectuate its laws, and some

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[22]344 U.S. 443, 532 (1953) (concurring opn. Of Jackson, J.).

[23]*Id.* at 541.

[24]*Id.* at 536.

[25]*Id.* at 540.

[26]*Id.* at 544.

issues do not. With respect to the latter, judges can ameliorate these problems. For example, those states that do not allocate sufficient funds to provide competent counsel can resolve that issue relatively simply. Problems that impact state sovereignty are more delicate. Both state and federal jurists should consider jurisprudential, sociological, and financial factors in deciding issues in capital habeas cases.

With respect to jurisprudential issues, Judge Comparet-Cassani said that the lack of finality of convictions and judgments impacts the state's ability to enforce its laws. It also impacts the quality of state criminal law, with respect both to its deterrent effect and to its effect on retribution. The other problem that exists when review goes on for years is impairment of the state's ability to retry a case, or part of a case, if it's remanded or reversed. Witnesses disappear, witnesses' memories fade, people forget, and witnesses die. It also has an impact on state judges with respect to their confidence in promulgating their decisions. One of the most important sociological impacts that death penalty habeas review has had is the loss of confidence by the public in the criminal law. The last factor that has to be dealt with is the financial impact of capital habeas cases. In the State of California, it costs approximately a little over $21,000 to house one inmate for one year.

Judge Comparet-Cassani noted that one case in which she served as prosecutor is still in the federal system. Before that it was in the state system for 15 years. It is now on federal review, and has been there approximately four or five years. Next year this particular case will be 20 years old. Housing the inmate has cost over $400,000 for the 20 years. In California there are over 550 inmates on death row.

She also referenced the initial cost of the trial; the initial appointment of whatever experts or investigators are required; the original appeal that went through the state court; and the petitions for habeas corpus filed within the state court system. She noted that a capital case is a very expensive enterprise. She said the ultimate penalty requires that type of careful consideration, but the cost implications must also be considered.

Judge Comparet-Cassani said that these are very serious cases that must be dealt with in a very technical manner. At the same time, both state and federal judges must do their job, and must say what the law is correctly and without a doubt. She said she was impressed and amazed that federal judges can figure these cases out at all in light of their complex histories and huge records. She believes that it would be helpful for the state to include a chronology in the brief, telling the federal court exactly what happened on what date.

Professor Oakley asked for a show of hands of federal district judges who were currently or had been responsible for adjudicating federal habeas claims from state court convictions. There were eight or ten responses. He also surveyed state judges who had presided over trials that were later subject to federal habeas review. The panel then took questions from the audience.

Judge McConnell said that the public lacks understanding of the different roles of state and federal judges in death penalty cases, creating a loss of confidence in the courts. Judge Comparet-Cassani agreed that community outreach projects should educate the public as much as possible on the capital case system. Judge McGee asked whether a Ninth Circuit committee of state and federal judges should approve forms and install a habeas lawyer in every prison system. Professor Yackle endorsed a system that would provide more competent counsel, to represent death row inmates from start to finish. Chief Judge McNamee noted legislative and

Congressional resistance to spending adequate funds on appointed counsel. Nevertheless, he said that on a cost-benefit analysis it benefits the taxpayers to appoint competent counsel at the outset.

Professor Oakley noted that the State Justice Institute has funded death penalty law clerks in some state courts on a pilot project basis. He also commented on the legislative history of AEDPA. Justice Martone asked whether there was any sentiment to return to the pre-1953 model of federal habeas review and, if not, whether there was sentiment for state judges to decline to resolve federal questions. Professor Yackle said there was no sentiment at all to make state court judgments conclusive in these cases. He could not imagine a system where state judges would not treat federal issues. Chief Judge McNamee said he knew of no sentiment on the part of federal judges for state judges to bypass ruling on federal questions.

Magistrate Judge Snyder said that in California there are one-line summary denials of relief from the state supreme court. She wondered if that lack of guidance was a problem nationally. Professor Yackle said that one of the memos in his materials cites some Fourth and Fifth Circuit cases about this difficulty with state court dispositions without explanation. Chief Judge McNamee said that members of the California Supreme Court have met with federal judges on this subject but have been unable to resolve the problem. In Arizona, under Rule 32, the federal courts often get detailed opinions from the Arizona Supreme Court which tell exactly what happened and why.

Professor Oakley concluded the panel's discussion by noting that state trial judges in capital cases must be alert to the competency of defense counsel. Generally the capital defendant has very limited control of appointed counsel. The trial judge has a positive obligation to exercise oversight of counsel's performance and, if necessary, to relieve counsel. As for state appellate judges, the more that they explain their reasoning, the greater the likelihood of having their decisions be given preclusive effect. Federal judges must remain sensitive to state interests as they carry out their responsibilities under AEDPA.

VII. EFFECTIVE COMMUNITY OUTREACH: DEMYSTIFYING THE COURTS

Moderator/Panelist: **Hon. Veronica Simmons McBeth, Judge of the Superior Court of Los Angeles County, California**

Co-Panelists: **Hon. Arthur Gilbert, Presiding Justice, California Court of Appeal, Second District, Division Six**

Hon. Saundra Brown Armstrong, Judge of the United States District Court for the Northern District of California

Judge McBeth chairs a special task force on court/community outreach for the Judicial Council of California. She announced that she would describe the efforts to date to institutionalize judicial outreach programs in California. She warned that much of this effort takes place on nights and weekends, further eroding judges' free time. Judge Armstrong has chaired a similar committee within the federal-court system. Justice Gilbert has been leading a program to make high school students familiar with the work of his court.

Judge McBeth explained the grounds for her view that this is a critical period in the history of the courts' relationship to the public. Although people hold judges in high esteem, the general level of confidence in government is low, while the scrutiny of all branches of government, including the courts, is closer and more intense than ever. Judge McBeth's court in Los Angeles County suffered considerably from the attention engendered by the O.J. Simpson trial. This created "an insatiable appetite [among the public] for the workings of our court and for gossip about the workings of the court." In Judge McBeth's view, "we can't be sanguine when we're confronted with the negative perceptions that seem to abound these days." Moreover, there is less sympathy and understanding to be found in the state legislature. Lawyers now make up barely one-fifth of the California legislature, an institution that lawyers used to dominate. "And believe me, these folks don't know anything about our system."

Judge McBeth championed proactive community outreach programs as the only effective way for judges to deal with myths and misperceptions about the judicial process. "Those misperceptions aren't going to go away if we just turn our back on them. Community outreach offers us an opportunity not to rely on media, lawyers, litigants, and elected officials to define who we are and what our system is about. We need to go out and educate the public."

With the aid of an ABA survey and a video clip from a program she produced in 1993 in conjunction with the National Center for State Courts, Judge McBeth illustrated the scope of the problem of ill-informed public perceptions about the courts, and how these can be remedied through the active participation of judges in community outreach programs. Effective strategies for building and administering such programs are set forth in detail at her task force's website:
< http://www.courtinfo.ca.gov/programs/community/outreach/task_force.htm > .

Justice Gilbert explained that his personal commitment to community outreach was reinvigorated by the caricature of a judge portrayed on television by Judge Judy and her daytime-TV rivals. The resolution of real disputes between real people by former judges hosting entertainment programs has created "a perception that judges act this way," speaking harshly and flippantly to litigants "in a society where civility has been plummeting. And so that's one reason that encouraged me." A second reason was his experience, in responding to questions about his job by educated, professional people. "I'm stunned by how naive the questions are. They talk to us as though we're legislators. They don't have a concept, not a clue of what this whole enterprise is about."

In Justice Gilbert's view, public ignorance leads to a loss of the intellectual capital upon which judicial independence depends, and leads to regrettable laws such as those requiring mandatory sentencing according to arcane formulas more complex than the Internal Revenue Code. Such harsh and inflexible sentencing laws "would not have been passed had we had more respect, had the judiciary had more respect. . . . So these kinds of things impelled me to get out there, and we have to educate and we have to teach." This is as true for appellate judges who face only retention elections, and federal judges who face no elections at

all, as for trial judges who are in the trenches were the problems of public pressure and misperception are the greatest.

There are two ways to go about the outreach function that Justice Gilbert has found personally effective. The first is to make appearances at service organizations and similar groups of ordinary, concerned people, such as the Kiwanis Club. Here it is important not to give a lecture, but rather to invite questions and to draw the audience into an illuminating discussion that will dispel erroneous assumptions about the leeway judges have to decide cases anyway they choose. The second is to work with high schools to develop a program in which students, with the consent of the lawyers concerned, read the briefs in simple cases and, having already discussed the issues, come to court to hear the cases argued. The students receive a briefing from a research attorney on how the court operates, and they meet the judges after the oral argument. It can be amazing "how intelligent these high school kids are." They sometimes would make better advocates than the actual lawyers. "They make terrific arguments and they come and they really get to the issue. And they're so interested. They tell their friends and it snowballs."

Judge Armstrong chairs the "CARES" Committee of the Northern District of California. The acronym stands for "Community Access, Relations, Education, and Service." In her view, the personal rewards to judges participating in community outreach programs are as great as the rewards to the community. The public, and especially schoolchildren, are "hungry for this information. They are so appreciative." This sense of making an impact and being appreciated can be very energizing for the judge who makes the outreach effort.

The Chief Judge of the Northern District of California became concerned that federal judges were lagging by behind state judges. Because of Judge Armstrong's previous personal interest in outreach programs, she was asked to head the CARES committee and charged with making community outreach an institutional priority of her court. Among the strategies and techniques that have proved valuable are the following:

- Development of a judicial speakers' list. This allows individual judges to be matched with organizational requests for a judicial speaker, and without a great investment of time allows judges averse to long-term outreach involvement to make a contribution on a one-time basis.

- Courthouse tours, primarily involving groups of young people, also don't require a lot of time but are "incredible in terms of the benefit that the young people get from being able to have an educated tour of the courthouse where each person is introduced and their roles explained."

- Educational programs that bring judges to schools to make presentations and answer questions.

- Participation in mock-trial programs in the schools. This is one of Judge Armstrong's favorites, since she believes children learn better from doing than from being told. She likes to create problems that resonate with the lives and experiences of children — such as petty theft among children — and have children play all the roles in the judicial process that responds to the problem: prosecuting and defense attorneys, witnesses, marshals, clerks, jurors, and judges. Mock trials are quite labor intensive — sometimes the children call her at home for tips on preparation — but the rewards are proportionate.

! Trial advocacy programs of a more traditional kind involve law schools and high school competitions. They will request judicial participation, and this is another good way for judges willing to make a one-time commitment to do so in a manageable way.

In closing, Judge McBeth referred the conferees to Judge Richard Fruin's collection of relevant information and advice in "Judicial Outreach on a Shoestring," a booklet published in 1999 by the American Bar Association.[27]

VIII. STATE-BY-STATE SMALL-GROUP REPORTS

Moderator: **Prof. John B. Oakley, Conference Reporter, King Hall School of Law of the University of California at Davis**

Reporters: **Hon. John Sedwick, Judge of the United States District Court for the District of Alaska**

Hon. Linda A. Akers, Judge of the Superior Court of Maricopa County, Arizona

Hon. Cecilia Castellanos, Judge of the Superior Court of Alameda County, California

Hon. Darryl Y.C. Choy, Judge of the Circuit Court for the First Judicial Circuit, Honolulu, Hawaii

Hon. N. Randy Smith, Judge of the District Court for the Sixth Judicial District, Pocatello, Idaho

Hon. Ralph B. Kirscher, Chief Bankruptcy Judge, United States District Court for the District of Montana

Hon. Charles M. McGee, Judge of the District Court for the Second Judicial District, Reno, Nevada

Hon. Pamela L. Abernethy, Judge of the Circuit Court for the Third Judicial District, Salem, Oregon

Hon. Robert J. Bryan, Judge of the United States District Court for the Western District of Washington

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[27]Copies of RICHARD L. FRUIN, JR., JUDICIAL OUTREACH ON A SHOESTRING: A WORKING MANUAL (1999) can be obtained from the ABA Order Fulfillment Department by toll-free telephone call to 800-285-2221. For a list of this and related publications, see the ABA's website at <http://www.abanet.org/justice/justresource.html>.

Each state's conferees again met as a small group, and were asked to prepare a report to be given at a concluding plenary session. The small groups[28] were asked by the Conference Reporter each to identify (1) a headline identifying the most important topic discussed at the conference; (2) a topic not discussed at this conference that would have been useful to have on the agenda, or to place on the agenda for a future conference; and (3) a measure of the health of current state-federal judicial relations in the state, whether expressed in terms of a healthy temperature of 98.6 degrees,[29] or by some other metric or metaphor.[30]

Alaska's headline was: "Judges Exchange Ideas." It identified a host of additional topics worth discussing: (1) supplemental jurisdiction; (2) certification; (3) whether Alaska's $50,000 jurisdictional amount for its trial courts of general jurisdiction should be raised to match the $75,000 required in federal court — thus obviating some removal problems; (4) civility and lawyer discipline issues; (5) identifying and dealing with impaired lawyers; (6) electronic docketing and filing; (7) video arraignments and other technological innovations where state and federal practice are not congruent; (8) better training for court personnel in dealing with the public, along the lines of the training that bank tellers get; and (9) court security and media relations. Alaska's temperature of state-federal judicial relations was an optimal 98.6 degrees. There is no death penalty to fuel conflicts. State and federal judges in Alaska share facilities, attend conferences jointly, call each other when consultation is needed, pool their financial resources where feasible, and endeavor to have the same procedural rules.

Arizona's headline was: "State and Federal Judges Share Common Genes." Its agenda item was a trilogy of related issues: "removal, remand, and certification." Arizona's state-federal judicial relations are perfectly healthy — right at 100 percent.

California's headline was: "State and Federal Judges Meet Together to Improve Services to Public."[31] Its agenda items were: (1) international border issues affecting state and federal courts; (2) overlapping issues of substantive law, such as bankruptcy law, removal, federal civil-rights litigation, and injured employee litigation under the FELA and the Jones Act; and (3) the need for joint federal-state judicial education programs in areas such as habeas corpus. California's state-federal judicial relations have improved markedly since the first Western Regional Conference in 1993. There is arguably still room for improvement in areas such as capital habeas corpus, but the temperature is very close to ideal — 98.5 degrees.

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[28]The small group reports were not delivered in alphabetical order, as they were on the first day, but are reported as such for ease of reading and reference.

[29]This was the metaphor used in the state-by-state small-group reports at the conclusion of the first Western Regional Conference. *See* John B. Oakley, *Proceedings of the Western Regional Conference on State-Federal Judicial Relationships*, 155 F.R.D. 233, 310-320 (1994) (using thermometer icons for each state to display the relative temperatures of their state-federal judicial relationships).

[30]Some states reported their current "temperature" readings after the first day's small-group discussions. For consistency the Conference Reporter has included all such data in this report of the second day's small-group discussions.

[31]California's Reporter suggested an alternative formulation of this headline that would evoke the scientific portions of the conference: "State and Federal Meet and Intellectually Cross-Pollinate."

Hawaii's headline was: "Similarities Outweigh Differences." Its agenda item was: "Costs and Delays in Case Processing." This concern reflects the citizen's perspective, as well as that of the courts. Greater efficiency would result in less cost to litigants. "Members of our group were surprised to hear that divorce cases have attorney costs in the $90,000 range. It's making it pretty unaffordable for people to get divorced in the state of Hawaii." The temperature of state-federal judicial relations in Hawaii, which was good in 1993, has become even better — call it 98 degrees. Like Alaska, Hawaii is a small state without a death penalty, and with very little friction between the state and federal judiciaries.

Idaho's headline, as modestly revised by the Conference Reporter, was: "The Hearts of State and Federal Judges Beat as One." Idaho proposed three agenda items: (1) case management techniques, including the avoidance of inter-court scheduling conflicts; (2) judicial writing techniques, including a study of how to write more lucidly and more civilly when conflicts between systems need to be addressed and resolved in a constructive fashion; and (3) joint construction and occupancy of judicial facilities. The temperature of state-federal judicial relations in Idaho is "boiling," in the constructive sense of the hotter the healthier. Relations are very good.

Montana's headline was: "Genomes, Habeas, Jury Trends, and Why the Public Might be Confused — a Need for Outreach" It identified four agenda items: (1) educational programs for groups and schools; (2) developing technology so that evidence would become electronically portable between state and federal courts — such as having exhibits put on compact discs that are readable in both court systems; (3) improving communications between courts so that decisions by one system affecting the other, such as habeas decisions, are fully and clearly explained; and (4) making effective use of long-range planning for the courts. Montana's state-federal judicial relations are excellent — at the 100 percent level. The federal courts are making appropriately conservative use of certification of state-law issues, and the state supreme court is responding in a constructive, cooperative fashion to these certifications.

Nevada's headline was: "Judges Vow Communication and Cooperation!" Its agenda items were: (1) Native American issues; (2) capital cases (an agenda item that Nevada thought future conferences would have to confront virtually in perpetuity); (3) conflicts between state and federal judicial processes caused by state-federal tensions involving the executive or legislative branches of government, e.g., differences over prosecutorial or sentencing policy; (4) drug cases and interdiction; and (5) the effect of the politicization of the judicial selection process on the independence of the judiciary at both the state and federal levels. Nevada's temperature regarding state-federal judicial relationships was characteristically hot, "at least in terms of personal communications. Everybody knows everybody in Nevada. We gave ourselves a much cooler grade when it comes to getting out the word. We have a very active federal-state judicial council, but not too many people know that it exists or what good work it does." Along with institutionalized rather than personal channels of communications between systems, habeas corpus is a second area where the temperature of state-federal judicial relations in Nevada is in the middle range, with room for improvement, rather than at the high-as-can-be extreme of the healthy range.

Oregon's headline was: "How Do We Educate the Public?" Its agenda item was: a practical discussion, at a nuts-and-bolts level, about how state and federal courts might reduce costs by sharing resources — physical facilities, software systems and information, jury lists, and the like. Oregon's temperature of state-federal judicial relations is excellent at the interpersonal level (100 percent) but slightly lower (95 percent) and thus capable of improvement at the institutional or systemic level where habeas or post-conviction-review

issues arise, where the state-federal judicial council needs reinvigoration, and where state and federal long-range planning could be more closely integrated.

Washington's headline was: "Communication Brings Respect." It proposed a variety of agenda items, including: (1) day-to-day issues such as avoidance of intersystem scheduling conflicts; (2) education of state judges on the basis and effect of bankruptcy stays; (3) exchanges of technical information and technical resources such as interpreters; (4) improvement of intersystem communication and coordination regarding admissions to the bar and attorney discipline; (5) discussion of trends jointly affecting state and federal courts, such as an apparent rise of employment cases in federal court and parallel decline in business cases in state court, increases in pro se cases, and significant new legal issues likely to recur and increase; (6) exploration of overlapping and possibly interactive areas of jurisdiction, such as guns, non-support, violence against women, drugs, sentencing, and the impact of these factors and immigration status on forum selection; (7) expansion of joint federal-state judicial education programs, not only locally but by providing access to state judges to attend satellite-broadcast programs of the Federal Judicial Center. The temperature of Washington's state-federal judicial relations is perfectly healthy — 98.6 degrees. Most of Washington's delegates were either former or present state judges, so lines of communication between the court systems are very good. The conferees recommitted themselves to ensuring that the state-federal judicial council meets annually.

Judge McConnell as co-chair of the Planning Committee and Professor Oakley as Conference Reporter thanked the conferees for their time and attention, urged them to take seriously the areas identified as ripe for improvements in state-federal judicial relationships, and sought the conferees' feedback on how to encourage state and federal judges to continue to share ideas and build lasting channels of constructive communication.

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